in which they deposed all the five conditions as required by the section. That being so, it is now on the party, that is the plaintiff, who wants to keep out of arbitration to satisfy the court that there are good grounds for the case to proceed: see 2 *Halsbury's* Laws of England (3rd edn.), para. 55, page 24. However, the court has an over-riding discretion in the matter "to be exercised according to the varying nature of the different cases presented to it." (See *Vawdrey* v. *Simpson* [1] at page 169, *per* Chitty J.). Lord Macmillan in his speech in the House of Lords in *Heyman & Anor.* v. *Darwins Ltd.* [2] posed the matter in this way:—

"The Arbitration Act, 1889, section 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not *ex debito justitiae*. Though the dispute is clearly within the arbitration clause, the court 'may' still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under section 4, always subject to the discretion of the court."

Applying the section and treating the onus as lying upon the plaintiff, the question arises as to whether he has discharged that onus and shown a good reason why the arbitration should not take place. The plaintiff put in an affidavit deposing that sufficient grounds exist for keeping the action out of arbitration. He contends, among other things which are not necessary to determine, that assuming the arbitration clause is applicable (which is denied), the terms of submission are not wide enough to cover all the issues raised or likely to be raised in the present action. In particular, he contends that the defendants have in two of their letters indicated their intention to raise questions as to the standard rent of the said premises and are accordingly questions within the exclusive jurisdiction of the Rent Assessment Board as established under the Control of Rent Ordinance from time to time in force. I accept the validity of that argument. It is clearly within the exclusive jurisdiction of the Rent Assessment Board to determine issues in respect of standard rent of premises under the Ordinance and I should not think it right to leave a dispute such as this to an arbitrator where the determination of a dispute by him would necessarily imply that he can have no jurisdiction.

An additional reason put up by the plaintiff is that the second covenant under the agreement was entered into by the defendants after the execution of the lease and therefore does not come within the scope of the arbitration clause. He therefore contends (although that is denied) that the first covenant under the lease comes within the jurisdiction of the arbitrator while the second covenant does not. In such a case he says that it is not right to split the litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere. It may be recalled that one ground of the plaintiff's action is for damages for alleged breach of both the covenants under the lease and the subsequent agreement. I am of the view that the agreement of 1957 cannot be read as part of the agreement contained in the lease, but was a subsequent agreement entered into between the parties and imposing upon the defendants certain fresh liabilities. A close examination of the arbitration clause reveals that the scope of the reference to arbitration extends only to matters "under or in connection with this lease," and that, to my mind, simply refers to matters arising under the lease alone and does not include matters arising under the subsequent agreement. In the circumstances I do not think it would be rational to cut up the litigation into two distinct actions, one to be referred to arbitration and the other to be adjudicated upon. Even if the arbitration clause were to be construed so as to include all matters arising or which might arise under the subsequent agreement, I should not think it right to refer the case to arbitration because there may be questions arising as to the construction of the agreement and its effect upon the provisions of the lease, and these questions would not come within the powers of the arbitrator. In the circumstances it would not be reasonable to refer the case to the arbitrator who could only deal with questions arising under the lease and would not be competent to deal with other questions arising under the subsequent agreement. (See *Turnock* v. *Sartoris* [3]).

Reviewing the case as a whole, I am satisfied that there are good reasons for not staying the action, and that the plaintiff has discharged the onus which is placed upon him, and I therefore exercise my discretion in holding that the matter ought not to be referred to arbitration.

The defendants' application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

CHAY HON SONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi C.J. (Malaya)) November 28, 1966]

[K.L. — Criminal Appeal No. 86 of 1966]

Evidence — Burden of Proof — Sufficient if reasonable doubt raised by accused — Whether name in baptism certificate referred to appellant — National Service Ordinance, 1952, s. 5(2).

National Service — Failure to present for registration — Benefit of the doubt — National Service Ordinance, 1952, s. 5(1) & (2).

The appellant was convicted on a charge of failing without lawful excuse to register for national service,

an offence punishable under section 5(2) of the National Service Ordinance, 1952. Evidence was given on his behalf by a priest, that a Joseph Tsai had been baptised, but there was no conclusive proof that the name referred to the appellant. The learned magistrate convicted the appellant on the ground that he had not rebutted the prosecution evidence.

Held: the learned magistrate had misdirected himself on the burden of proof. The burden is always on the prosecution to prove beyond reasonable doubt that the accused person is guilty of an offence as charged and an accused person would be entitled to an acquittal if he succeeded in raising a reasonable doubt in the mind of the trial court. The learned magistrate should have given the benefit of the doubt to the appellant as the person Joseph Tsai in the baptism certificate might in all probability be the appellant.

MAGISTRATE'S CRIMINAL APPEAL.

Chew Kok Chooi for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): This is an appeal against the judgment of the magistrate at Kuala Lumpur. He convicted the appellant on the following charge:—

"That you on the 9th April, 1965 being a person affected by a notice given under sub-section (1) of section 5 vide L.N. No. 320/63 dated 23.11.63 without lawful excuse did fail to present yourself for registration in accordance with the said notice and that you thereby committed an offence punishable under section 5(2) of the National Service Ordinance 37 of 1952."

The facts of the case may be summarised as follows. The appellant wished to go to Japan and on 7th April 1965 he wrote to the proper authority under the National Service Ordinance for an exit permit. In that application he said among other things "Due to age miscalculation, I have not registered in the National Service, should further notice which require for registration, I shall be happy to do so," and in his application for the exit permit he stated that he was born in 1935.

When an officer in the department of National Service found out that the appellant was born 1935 and therefore subject to be called for service he made a report to the police. Subsequently the appellant was brought before the court and charged as above.

The appellant's name according to the application and identity card is Chay Hon Song. At the trial the appellant said that in January 1964 he went to a registration centre at the Cochrane Road School and when he presented his national registration identity card he was told that he was too old for service. His mother gave evidence on his behalf and said that the appellant was her eldest son and that he was born on 20th July 1933 and not in 1935 as stated in the national registration identity card, and that the appellant's name was Joseph Tsai which apparently is another way of spelling the word Chay. The Rev. Father Gurand, a priest at the Holy Rosary Church, Brickfields, Kuala Lumpur, affirmed that according to the register of baptisms, the appellant's mother did register and obtained a certificate of baptism in reference to her son Joseph Tsai but he himself of course could not say whether the appellant was the same Joseph Tsai.

The appellant's mother also stated that she had three sons and appellant was her eldest son.

The learned magistrate in his judgment after referring to the evidence of the priest emphasised the fact that according to the priest, Joseph Tsai to quote the actual words "may be the name of the defendant" and then the learned magistrate went on to say "There is no conclusive proof that the name Joseph Tsai refers to defendant and no one else" though subsequently he referred to the evidence of appellant's mother and to her evidence that the date of the birth of the appellant in the identity card may be wrong due to her mistake. The learned magistrate also went on to say that no attempt had been made by the defence to tender an extract of the birth certificate of the appellant to prove the correct age and again no evidence was offered to corroborate the appellant's attempt to register for national service at the Cochrane Road centre and that he was rejected by the authorities and the appellant, therefore, according to the learned magistrate, had not rebutted the prosecution evidence and had not explained why the date of birth stated in his application for the permit was wrong.

In my view the learned magistrate had misdirected himself on the burden of proof. It has, I think, been said again and again that the burden is always on the prosecution to prove beyond reasonable doubt that the appellant is guilty and that the appellant would be entitled to an acquittal if he succeeded in raising a reasonable doubt in the mind of the trial court. In other words, it is not necessary that the defence must convince the court, nor need the defence evidence be conclusive.

For the above reason, in my view, the learned magistrate should have given the benefit of the doubt to the appellant on the ground that the person Joseph Tsai in the baptism certificate may in all probability be the appellant.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw.*

AHMAD BIN ALI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) December 28, 1966]

[Penang — Criminal Appeal No. 19 of 1966]

Penal Code, ss. 441 and 445 — House-breaking — Criminal trespass — Entry upon property to persuade girl in house to slip out and hold a tete-a-tete — Whether an offence.